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No. 229

IN THE

Supreme Court of the United States

OCTOBER TERM, 1946

ROBERT P. PATTERSON, SECRETARY OF WAR, AND EDWARD F. WITSELL, THE ADJUTANT GENERAL, UNITED STATES ARMY, *Petitioners*,

v.

JAMES JOHN LAMB

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia

BRIEF FOR THE RESPONDENT IN OPPOSITION

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Opinion Below

The District Court did not render an opinion. The opinion of the Court of Appeals (R. 22-28) is reported at 154 F.(2d) 319.

Jurisdiction

The judgment of the Court of Appeals was entered on March 25, 1946, (R. 29). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

Question Presented

Whether a court may, by mandatory injunction, direct the Secretary of War and The Adjutant General to issue to a soldier a discharge certificate that is in accordance with the facts, and with the Army regulations existing at the time of the soldier's discharge.

Statutes and Regulations Involved

The pertinent portions of the statute and regulations involved are set out in the Appendix to the petitioners' brief, pp. 20-25.

Statement

The respondent filed suit in the District Court of the United States for the District of Columbia to obtain a judicial ruling that he was an honorably discharged soldier of World War I, and a mandatory direction to the predecessors of the petitioners to issue to him a certificate of honorable discharge as such. The District Court granted a motion to dismiss on the ground that the complaint failed to state a cause of action on which relief could be granted. The United States Court of Appeals reversed the judgment of the District Court.

The facts, alleged in the complaint and admitted by the motion to dismiss, are these:

The respondent, James John Lamb, a resident of Davenport, Iowa, was notified on November 9, 1918, by his local draft board that he had been selected for immediate military service. He was ordered to report to the board at 9:00 a.m. on November 11 for military duty. The notice which he received informed Lamb that "from and after the day and hour just named you will be a soldier in the military service of the United States". (R. 13) The respondent reported at the designated time and place and was then notified orally by the local board that he was a soldier in the Army of the United States. By a written warrant of ap-

pointment, he was made the leader and special police officer of a contingent of drafted men during the journey from Davenport to Camp Dodge. (R. 14) Pursuant to an oral order given to him later on the morning of November 11, Lamb assembled his contingent and proceeded with it from the office of the local board for the purpose of entraining for the camp.

Before the respondent had actually boarded a train, however, he was told orally that because of the armistice with Germany draft calls had been cancelled. But he was also told that he was still a soldier, subject to military orders and to laws and regulations governing the army, and that he must hold himself in readiness at all times to obey further orders.

On November 15, 1918, Lamb received by mail from his local board a notice that by order of the Provost Marshal General, acting under the instructions of the President, all orders of induction into the Army had been cancelled and that all registrants who were inducted into the Army, but not entrained, were discharged from the Army, *and that the cancellation of such induction orders in cases of registrants who were inducted had the effect of an honorable discharge from the Army.* (R. 15) This action was taken by the local board pursuant to an order of the President, issued through the Provost Marshal General, dated November 11, 1918, which contained the following language (R. 16):

> The President further directs that all registrants who are already inducted into the Army under these calls because of the fact that the day and hour specified in form ten twenty-eight or entered in column twenty-four of the classification list have arrived, but who have not been actually entrained for a mobilization camp, shall be, and that they are hereby, discharged from the Army.

On or about January 26, 1919, Lamb received a certificate styled "Discharge from Draft" which had been issued at

and mailed from Camp Dodge and which was dated as of November 14, 1918. (R. 17) Accompanying it was a Quartermaster's check for $4.00 bearing the notation "Final Pay", which was in payment for service with the army for the period from November 11, 1918, to November 14, 1918, both dates inclusive. (R. 19) From that time on Lamb represented himself as having been honorably discharged from the Army of the United States.

The complaint alleged (Paragraph 15, R. 6), and the motion to dismiss admitted, that the respondent's army service was honest and faithful and his conduct was such to warrant his reenlistment.

A statute of Iowa grants tax exemption on "the property not to exceed Five Hundred Dollars in actual value of any honorably discharged soldier, sailor, marine or nurse of the War with Germany." After the enactment of this exemption Lamb annually applied to the taxing authorities of Scott County, Iowa, the place of his residence, for exemption thereunder, and until the year 1940 each annual application was granted by those authorities. But when he presented his verified claim for the statutory exemption for the year 1941, the Board of Supervisors of Scott County claimed that he had not been a soldier, that he had not been honorably discharged from the army, and that his status was merely that of one who had been discharged from the draft.

Immediately following this occurrence, Lamb sued the members of the Board of Supervisors in the state court at Davenport, alleging that he was an honorably discharged soldier of the war with Germany and that the supervisors had acted illegally in denying him the tax exemption. He prayed that the court declare him to have been honorably discharged and, therefore, entitled to the tax exemption. In May 1942 the Scott County District Court adjudged that "James J. Lamb is an honorably discharged soldier of the War with Germany which frequently is called World War I." Thereafter the Board of Supervisors appealed to the

Supreme Court of Iowa and on March 9, 1943, that court reversed, a majority and a dissenting opinion being filed. In the course of the majority opinion it was said, "we feel there is a serious doubt upon the question whether the appellee in an honorably discharged soldier of the War with Germany within the meaning of section 6946, Code of Iowa 1939". A rehearing was denied on June 15, 1943.

On November 2, 1943, the respondent applied to The Adjutant General of the United States Army for a certificate of honorable discharge. The request was denied on November 20, 1943. Lamb endeavored to get The Adjutant General to reconsider, but that official finally informed him on February 29, 1944, that he adhered to his original denial of the claim. Lamb then filed suit in the District Court of the United States for the District of Columbia against Henry L. Stimson, then Secretary of War, and J. A. Ulio, then The Adjutant General of the United States Army. In his complaint he recited in detail the facts which we have summarized, and prayed that the court declare that he had been a soldier in the Army of the United States from November 11, 1918, to November 14, 1918, both dates inclusive, and that during that period his conduct was such as to warrant his reenlistment in the army and that his service was honest and faithful; that he was not rejected because of physical unfitness; that he is an honorably discharged soldier of the war with Germany and that he is entitled to a certificate showing that his service in the army was honest and faithful; and that he was honorably discharged from military service by reason of the order of the President, dated November 11, 1918. He further prayed that the court mandatorily direct the defendants to issue to him "a proper and lawful discharge from the Army of the United States as by law provided * * *"

The Court of Appeals held that the discharge from draft certificate issued to the respondent was not authorized by regulations in force on the date of the respondent's dis-

charge; that under the existing regulations and the admitted facts the respondent was entitled to a certificate of honorable discharge; that the duty of the authorities to issue to him such a certificate was merely ministerial; and that the claim of the respondent was not barred by laches.

Argument

1. The form of discharge certificate issued to respondent was not authorized by the regulations in force on the date of his discharge.

The petitioners argue that Circular No. 651, promulgated by the War Department on January 12, 1918, authorized the certificate of discharge from draft issued to the respondent (Petitioners' Brief, pp. 10-12; Petitioners' Appendix, pp. 21-22). This argument is clearly unsound, since Circular No. 651 related only to men who were *rejected*, whereas upon the admitted facts the respondent was not rejected but was in every respect qualified for military service. (Complaint, Paragraph 15, R. 6) Indeed the petitioners in the court below did not rely upon Circular No. 651 as authority for the certificate issued to the respondent; on the contrary the petitioners argued that this form of discharge had been authorized by Circular No. 111, dated December 4, 1918. Significantly, Circular No. 111 refers to the certificate of discharge from draft, Form No. 638-1 AGO, which was issued to the respondent, as a "*new blank form*" (Petitioners' Appendix, pp. 22-23).

It is plain that the issuance of a discharge certificate to the respondent was governed only by paragraph 150 of the Army Regulations, which provided that a certificate of honorable discharge should be issued when the soldier's conduct had been such as to warrant his reenlistment and his service had been honest and faithful (Petitioners' Appendix, pp. 20-21).

As the complaint alleged (Paragraph 15, R. 6), and the motion to dismiss admitted, the service of the respondent

was honest and faithful and his conduct was such as to warrant his reenlistment.

2. The petitioners were under a ministerial duty to issue to the respondent a certificate of honorable discharge.

As the Court of Appeals said (R. 25-26):

> It must be conceded that the determination originally of the several forms of certificates of discharge was a proper exercise of the executive authority of the Secretary; but, having exercised that authority and having defined the three types of certificates to be issued, and having by regulation established standards to govern the selection of the proper form to be issued to each discharged soldier, the executive authority of the Secretary had been fully exercised, and the duty of the army officer at Camp Dodge in issuing a certificate of discharge to the appellant was simply ministerial, as though the regulation had been a statute. That officer did not have, and indeed the Secretary himself would not have had, the right arbitrarily to issue to Lamb any form of discharge certificate other than that which was appropriate to his status according to the standards set up in paragraph 150 of the Army Regulations. True it is that the Secretary again could exercise his executive authority to provide for additional and different forms of discharge, as he did by the regulations of January 12, 1918, and again on December 4, 1918; but, once standards are erected by regulation, it is merely ministerial to observe them. Consequently, it is incorrect to say, as the appellees do, that whether the appellant is entitled to a certificate of honorable discharge rests in the sound discretion of the Secretary of War.
>
> The court does not substiute its judgment for that of the Secretary as to the quality of appellant's service and his character as exhibited during that service. The Secretary determined, by paragraph 150 of the Army Regulations, that the blank for honorable discharge must be used "when the soldier's conduct has been such as to warrant his reenlistment and his service has been honest and faithful." The appellant's

complaint, against which the appellees' motion to dismiss was leveled, alleges that the appellant's conduct was such as to warrant his reenlistment and that his service had been honest and faithful. The motion to dismiss has the effect of admitting these facts. So, for the purpose of considering the motion to dismiss, it is the Secretary's considered judgment, expressed in paragraph 150, that Lamb is entitled to an honorable discharge.

The argument of the petitioners, that their discretion in issuing discharge certificates is completely unfettered, leads to dangerous results. If this argument be sound, then the petitioners may issue a certificate of dishonorable discharge to a soldier whose service has admittedly been in all respects honorable, and the soldier has no recourse. Indeed, it logically follows from the argument of the petitioners that they may revoke any honorable discharge certificate heretofore issued, and substitute therefor a new and different certificate in accordance with their whim of the moment. The effect of the decision of the Court of Appeals is only to require the military authorities to act in accordance with law. Certainly the military, like all others in authority, should be subject to law; if they are not, then our government has become a military autocracy.

3. The decision of the Court of Appeals is not in conflict with Palmer v. United States, 72 C. Cls. 401, or any other case.

In *Palmer* v. *United States*, 72 C. Cls. 401, the plaintiff contended that he had not been discharged from the Coast Guard by "proper authority" and that he was, therefore, entitled to recover certain pay and allowances. The basis of his contention was that prior to his discharge he had not received a medical examination or survey in accordance with procedural instructions contained in a Coast Guard circular letter. No question was raised as to the kind or character of his discharge certificate. In other words the

Palmer case involved only the mechanical procedure which led up to the discharge, and the case had nothing to do with the substantive right of an enlisted man to receive a particular type of discharge. It is obvious, therefore, that the case is not apposite here.

The Court of Appeals in its opinion correctly distinguished *Reid* v. *United States*, 161 Fed. 469. We may add that in that case the type of discharge issued to Reid was provided for by existing Army Regulations, and the Court properly refused to interfere with the exercise of the executive discretion *within the limits of the regulations*. The case can have no application here where the executive upon admitted facts has acted in violation of existing regulations.

The decision of the Court of Appeals is supported by *Davis* v. *Woodring*, 72 App. D. C. 83, 111 F. (2d) 523. That case was an action by Davis against the Secretary of War for mandamus to require the Secretary to issue to petitioner a certificate of honorable discharge from the Army or for a declaratory judgment that petitioner was lawfully inducted into the military service of the United States and was entitled to an honorable discharge certificate. It appeared that Davis had received a certificate of discharge from draft as a "rejected man" under the provisions of War Department Circular No. 651, dated January 12, 1918. The Court of Appeals held that under Paragraph 150 of the Army Regulations Davis would have been entitled to an honorable discharge; but the Court held that these regulations had been properly amended by War Department Circular No. 651, which applied to Davis. After quoting the provisions of Paragraph 150 of the Army Regulations, the Court said:

> *If this were all, we should be obliged to say that petitioner should have been given an honorable discharge, since admittedly his "conduct" warranted his reenlistment, and his service was honest and faithful.* But after our entry into the war and the passage of legislation creating a national army through the Selec-

tive Draft Act, the Secretary of War, under date of January 12, 1918, issued an order to mustering officers and others attached to mobilization camps, requiring them to make and forward records of accepted and rejected men on prescribed forms. Under the title "Disposition of Rejected Men", there is to be found a provision that men "discharged from draft" shall be furnished a certificate of discharge on Form No. 638, A. G. O., which is the form furnished to petitioner in this case.

* * * * * * * * * *

If, therefore, we are correct in thinking that the Secretary's January 12th order, amending the former regulations in respect to the form of discharges, was within his power, it follows that what petitioner received in this case—*being in accordance with existing regulations and also in accordance with the actual facts*—was all that he could lawfully demand. (Italics supplied.)

It is, therefore, plain that had Paragraph 150 of the Army Regulations not been modified by the order of January 12, 1918 (War Department Circular No. 651), *relating to rejected men and applicable to Davis*, the Court of Appeals would have held that Davis was entitled to an honorable discharge, and the Court would have directed the authorities to issue such a discharge to him.

4. The respondent was not guilty of laches.

The Court below fully answered the contention of the petitioners that the respondent's claim was barred by laches. The Court said:

Twenty-five years elapsed from the time appellant received his discharge certificate until he first attempted to obtain a certificate of honorable discharge, as the appellees pointed out. But laches is not like limitation, a mere matter of time. Although the appellant was discharged on November 14, 1918, and received a certificate of Discharge from Draft on January 26, 1919, he was told on November 15, 1918, by his local board that the Presidential order of November

11, 1918, discharging from the army all registrants who had been inducted but not entrained, had "the effect of an honorable discharge from the army." Until 1941, the appellant had no basis for supposing that there was any doubt concerning his status as an honorably discharged soldier. When that status was challenged for the first time, he manifested extraordinary diligence in asserting his rights. Moreover, the appellees do not claim that there has been any change of condition or relations since 1918 because of which it would be an injustice to them to permit the appellant to assert his rights now. Bearing in mind the essential elements of laches, it is our opinion that the appellants action is not barred by that defense.

5. Petitioners apparently argue that since the War Department has repeated in approximately 56,000 other cases the error which it committed in the case of Lamb, the Department's error has become too enormous to be corrected (Petitioners' Brief, p. 18).

In other words, Lamb must lose his right and his remedy because it would be inconvenient for the War Department to do him justice. We think that such an argument needs no answer. The case of the respondent should be judged according to its individual merits. The fact is, however, that few of the 56,000 indivduals, who according to the War Department received discharges from draft, will ever undergo the trouble and expense necessary to extract a proper discharge from the War Department; and that fewer still will be able to show that they have not been guilty of laches.

Similarly, the case of the respondent should not be prejudiced by statements of the War Department as to any alleged inequity to men who were rejected at mobilization camps (Petitioners' Brief, p. 18). The respondent was not rejected but was in every way qualified for military service, and he did in fact serve, and was ready and able to continue to serve. There are clearly reasonable grounds to distinguish between men in the situation of the respon-

dent, and men who were rejected as unfit for military service. In any event, the War Department made special provision for the issuance of discharge certificates to men who were rejected, but the Department made no such provision for the respondent and others in his situation.

Conclusion

The decision below is clearly correct. There is no conflict. The petition for a writ of certiorari should, therefore, be denied.

Respectfully submitted,

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